IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

WP(C).No. 33011 of 2007(E)

AGAINST THE ORDER DATED 08/10/2007 IN EP 275/06 IN OS.43/2005 of Munsiff-Magistrate COURT,PERINTHALMANNA

.....

PETITIONER:

K.ALIKKUTTY, S/O.KOMU,
KALLUPALAN HOUSE, J.N.ROAD,
PERINTHALMANNA AMSOM, DESOM.

BY ADV. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENT:

K.DAMODHARAN, S/O.LATE
N.P.KUTTISANKARA MENON, "ARADHANA",
ANGADIPPURAM AMSOM, DESOM.

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 07/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.N.Krishnan, J.

==========

W.P(C).No.33011 of 2007

==========

Dated this the 7th day of November, 2007.

JUDGMENT

This Writ Petition is preferred against the order of the Munsiff - Magistrate, Perinthalmanna in E.P.No.275 of 2006 in O.S.No.43 of 2005. The decree is one for realisation of the amount by arrest of the judgment debtor in civil prison. The judgment debtor is working in a Bank as a Bill Collector and though he is having a salary of 13,151/- after deduction, his carry home salary is only Re.1/-. Therefore, it is contended that he is not having any means to pay and so he shall not be arrested in execution.

2. The court below found that the very fact that he is availing the loan indicates that he is having landed property in his name. It is true that he has availed a loan and had constructed a house. In the decision reported in **Kuppuswamy** v. **P.G. Menon** - 1992 (2) K.L.T. 203, this Court held thus: "Where it is proved or admitted or otherwise evident that the judgment-debtor owns

or possess a house or has got interest therein, the normal presumption is that he is able to pay the debt either by sale or mortgage or creating other encumbrance of the house. In such circumstances, it is open to the judgment-debtor to rebut the presumption and prove either that he does not own or possess the house or that no alienation or encumbrance is possible of that property." This aspect has not been considered by the court below. Whatever it may be, in order to send a person to civil prison, Section 51 of C.P.C. mandates that he must have means to pay and he is deliberately evading payment. Therefore, unless there is satisfactory evidence to establish these factors, one cannot be sent to prison.

3. Therefore, in the interest of justice and in order to enable the judgment debtor to prove or rebut the presumption, I set aside the order passed by the court below and remit back the same to the said court for fresh disposal after affording an opportunity to both parties to substantiate their respective contentions. I also direct the writ petitioner to make a payment of Rs.5,000/- (Rupees five thousand only) on or before 7.12.2007 and he is directed to appear before the court below on the said

date. On that day, the court shall fix a day of appearance for the decree holder and then dispose of the matter in accordance with law.

Writ Petition is disposed of accordingly.

M.N.Krishnan,
Judge.

ess 10/11